CAP VS COMEBACK

The New Battle Over Reinstatement Rights

Proposed labour law reforms introducing a high-income threshold could limit reinstatement remedies, raising complex legal questions and reshaping dispute strategies across South Africa's public service. By AADIL PATEL, practice head and director, NADEEM MAHOMED, director, and CHANTELL DE GOUVEIA, associate, in the Employment Law practice at Cliffe Dekker Hofmeyr

The Labour Relations Amendment Bill, 2025 ("the Bill"), born of the NEDLAC Labour Law Reform Process that commenced in April 2022 and concluded in November 2024, proposes far-reaching reforms to the Labour Relations Act 66 of 1995 ("LRA"). Chief among these is the introduction of a high-income threshold set at R1,800,000 per annum. Employees earning above this threshold would forfeit their entitlement to reinstatement for ordinary unfair dismissals, with compensation capped at the threshold amount. Full remedies (including reinstatement and uncapped compensation) would remain available only where a dismissal is automatically unfair.

This article examines the implications of this proposed amendment for the public service, with particular reference to the Public Service Act, 1994 ("PSA") and recent jurisprudence.

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THE PROPOSED AMENDMENTS

The proposed amendments, contained in sections 39, 43 and 46 of the Bill, introduce a new section 193(2A) to the LRA, together with corresponding amendments to sections 194(1), 194(4) and Schedule 7. The explanatory memorandum seeks to justify this differentiation by reference to Article 12 of the ILO Convention on Termination of Employment, 1982 (Convention 158).

That reliance appears misplaced: Article 12 concerns severance allowances and income protection rather than the limitation of dismissal remedies or the exclusion of reinstatement.

The more pertinent provision is Article 2(5), which permits the exclusion of certain categories of employees where "special problems of a substantial nature" arise. Critically, however, the Convention contemplates exclusions grounded in the nature of employment rather than a purely income-based distinction. Whether an income threshold, standing alone, satisfies this standard remains open to question – and may well invite constitutional scrutiny.

INTERACTION WITH THE PUBLIC SERVICE ACT

The PSA must be read in conjunction with the LRA. Section 17(1)(a) provides that the power to dismiss a public service employee must be exercised in accordance with the LRA. It follows that amendments to the LRA's remedial framework will have direct implications for public service employees.

Of particular significance is section 17(3), the so-called "deemed dismissal" provision. Section 17(3)(a) provides that an employee who is absent without permission for more than one calendar month is deemed to have been dismissed for misconduct. Section 17(3)(b), however, confers a discretion on the executive authority to reinstate such an employee upon good cause shown.

This reinstatement mechanism is distinct from the remedy of reinstatement under section 193 of the LRA. The question that arises is whether the proposed limitation on reinstatement for high-income

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earners would have any bearing on (or indirectly constrain) the exercise of this administrative discretion. Given that many senior public servants earn in excess of R1,800,000 per annum, the amendments may give rise to a dual-track system: a senior employee dismissed through ordinary disciplinary processes would be confined to capped compensation under the amended LRA, whereas the same employee, if deemed dismissed under section 17(3), could potentially seek reinstatement through an administrative law route.

This divergence creates scope for strategic litigation and forum selection, particularly in disputes concerning how the termination is characterised.

RECENT JURISPRUDENCE

In *SAMWU obo Koopman v City of Cape Town (CA5/2023) [2025] ZALAC 7; [2025] 5 BLLR 495 (LAC); (2025) 46 ILJ 1132 (LAC) (22 January 2025)*, the Labour Appeal Court considered the enforceability of a reinstatement order granted to a municipal employee. The Court reaffirmed that a reinstatement order does not operate automatically; rather, it obliges the employer to reinstate and requires the employee to tender his or her services. Mr Koopman's failure to tender services proved fatal to enforcement, despite his having remained unemployed for over a decade while in possession of the award.

The Court further recommended that the judgement be referred to the Minister of Employment and Labour to consider legislative intervention requiring employers to initiate communication with reinstated employees regarding the tender of services. The case vividly illustrates the practical difficulties that attend reinstatement orders in the municipal context – difficulties that may persist unresolved for extended periods, to the detriment of employer and employee alike.

IMPLICATIONS FOR LOCAL GOVERNMENT

The differentiation of remedies based on income raises significant constitutional considerations. Sections 9 and 23 of the Constitution guarantee equality and fair labour practices, respectively, while section 195 requires that public administration be broadly representative and governed by principles of fairness and accountability. A regime that affords different remedial protections based solely on income may prove difficult to reconcile with these constitutional commitments, particularly within the public service.

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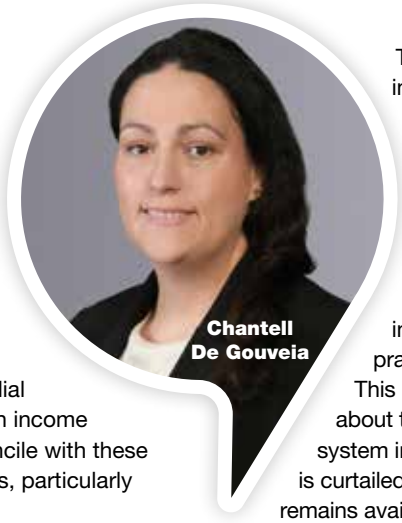

For municipalities, the proposed amendments present both opportunities and risks. The removal of reinstatement as a remedy for high-earning senior managers may provide greater certainty in managing executive-level exits. As Koopman illustrates, reinstatement disputes can remain unresolved for prolonged periods, with significant operational consequences.

At the same time, the limitation of remedies may incentivise employees to frame disputes as automatically unfair dismissals, for example, by invoking whistleblower protections or discrimination claims, to access reinstatement or uncapped compensation. This is likely to increase both the complexity and cost of litigation for municipalities.

CONCLUSION

The proposed high-income threshold represents a marked departure from a uniform remedial framework to one differentiated by earnings. In the public service context, this shift is complicated by the continued operation of the PSA, particularly the discretionary reinstatement mechanism under section 17(3).

The decision in Koopman demonstrates that reinstatement in the public sector is not merely a statutory remedy under the LRA, but one embedded in broader legal and practical considerations. This raises questions about the coherence of a system in which reinstatement is curtailed in one context yet remains available in another.

As the Bill proceeds through Parliament, the South African Local Government Association and its member municipalities should engage actively in the consultation process with a view to clarifying the relationship between the proposed LRA amendments and the PSA. Consideration should also be given to whether a purely income-based threshold adequately reflects the realities of public service employment, including its administrative law dimensions and constitutional imperatives.

Ultimately, the success of the proposed amendments will depend on whether they strike an appropriate balance between flexibility for employers and fairness for employees, while remaining faithful to the constitutional framework governing labour relations in South Africa. ■

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IMAGE: SUPPLIED